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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-54

CITY OF LOS ANGELES, *et al.*, *Petitioners,*

vs.

FANCHON BLAKE, *et al.*, *Respondents.*

CITY OF LOS ANGELES, *et al.*, *Petitioners,*

vs.

UNITED STATES, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief of Respondents Fanchon Blake, et al., in Opposition.

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Brief of Respondents Fanchon Blake, et al., in Opposition.

Plaintiffs/respondents, FANCHON BLAKE, *et al.*, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion filed in *Blake, et al. v. City of Los Angeles, et al.*, on May 2, 1979. Because the filing of a single petition by defendant CITY OF LOS ANGELES, *et al., is* inappropriate,[1] plaintiffs/respondents respectfully request this Court to consider separately the appropriateness of the writ in each action.

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[1]The filing of a single petition "where several cases are sought to be reviewed on certiorari" is governed by Rule

(This footnote is continued on next page)

Statement of the Case.

The following summation of the facts and procedural history of the case is drawn from the voluminous records and files[2] of *Blake v. City* only[3] and is consistent with the Court of Appeals' opinion therein filed on May 2, 1979 (Appendix "A" to the Petition).

23(5) of the Rules of the Supreme Court. Although the cases herein are "sought to be reviewed on certiorari to the same court" and are related cases (*i.e.*, both the private plaintiffs, who filed suit August 20, 1973, and the government, which filed its action June 2, 1977, challenge discriminatory employment practices of the defendant City of Los Angeles against applicants for sworn positions at the Los Angeles Police Department ["LAPD"]), the opinions of the Ninth Circuit do *not* present or involve "identical or closely related *questions*. . . ." In *Blake v. City of Los Angeles,* ..... F.2d ..... (19 FEP Cases 1441) (9th Cir. 1979), the Court of Appeals applied well-settled principles under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §§ 2000e *et seq.*, and under Rule 56, Federal Rules of Civil Procedure, and reversed an eve-of-trial grant of summary judgment for the City defendants, remanding the action for trial. In *United States v. City of Los Angeles,* ..... F.2d ..... (19 FEP Cases 1455) (9th Cir. 1979), the Court of Appeals interpreted the automatic fund suspension provision of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3766(c)(2)(E) and vacated the District Court's order enjoining the government from pursuing any administrative action regarding employment discrimination by the LAPD and from terminating any funds to the City because of personnel practices of the LAPD.

[2]Because plaintiff/respondents appealed to the Ninth Circuit from the District Court's May 13, 1977 grant of summary judgment without trial as to all issues, and because there were no separate Findings of Fact or Conclusions of Law approved or filed by the District Court (R.4003-4072), there is a massive record underlying the various claims and defenses of the parties. It consists of some 32 affidavits constituting a substantial portion of the 4187-page Clerk's Transcript on appeal, 46 separately filed deposition transcripts, and extensive Stipulations of Fact in the Pre-Trial Conference Order (R.3368-84) as well as innumerable answers to interrogatories and requests for documents filed by the parties during the three and one-half years of preparation for trial.

[3]The facts and procedural history of *United States v. City* are not included for the reasons that the government's

A. Nature of Action.

The action was filed August 20, 1973, challenging sexually discriminatory employment practices in the Los Angeles Police Department ("LAPD") in violation of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*), the Fourteenth Amendment to the United States Constitution, and the Civil Rights Act of 1871 (42 U.S.C. § 1983). The jurisdiction of the District Court was based upon 28 U.S.C. § 1343(3) and (4).

B. Procedural History.

By Order Certifying Class filed June 10, 1976, the plaintiffs/respondents represent a class of women who are past, present and future applicants for, employees in, and retirees from sworn positions in the LAPD (R.1693). On August 6, 1976, defendants/petitioners filed a motion for summary judgment (R.1991 to 2535), the hearing of which was continued by the District Court (R.3086) while the parties continued to prepare all aspects of the action for a November 2, 1976 trial. Due to severe illness, the District Judge on October 21, 1976 ordered all pending motions as well as the pre-trial conference and trial "off calendar" (R.3420), and on January 18, 1977 transferred the entire action to another District Judge for all further proceedings (R.3445). On the eve of the rescheduled pretrial conference date of May 16, 1977 (R.3974), the District Court granted summary judgment on all

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action was filed after the District Court granted summary judgment in *Blake v. City* and in no way bears on the scope or propriety of this Court's review on certiorari of any questions presented in *Blake v. City*.

issues in favor of the City defendants/petitioners (Memorandum Opinion filed May 13, 1977, reproduced as Appendix "B" to the Petition).

C. Factual Background.

Prior to July 1, 1973, the LAPD maintained separate, sex-segregated job classifications in the entry-level police positions and separate lines of progression. While men in the "policeman" classification could perform all assignments and promote through all ranks, women in the "policewoman" classification were limited in assignment to jail matron, desk duty and tasks relating to women and children and were ineligible for promotion above the level of sergeant. Between 1970 and 1973, the LAPD refused to accept applications from women and appointed no women to sworn positions, while accepting 26,759 applications from men and appointing 3,211 men to the entry level "policeman" classification (R. 3376-80).

Beginning on July 1, 1973, the L.A.P.D. established through a new "unisex" ordinance the single entry-level position of "police officer" for both men and women and imposed identical new entry requirements on both male and female applicants (R.3369-74). Nonetheless, by 1976, three years after the "unisex" job classification program had been established, the percentage of women in sworn positions in the LAPD continued to *decline*, from 2.62% in 1970, to 2.15% in 1973, to 2.08% in 1976. During this period, the number of women so employed dropped by 26 (or nearly 15%) while the number of men increased by 816 (or over 12%) (R.3375-79).

The causes of this decline were the minuscule appointment rate for women between 1973 and 1976 (following the total exclusion between 1970 and 1973), as a result of the minimum 5′6″ height and pre-employment physical agility requirements, newly erected as selection standards with the implementation of the "unisex" program in 1973 (R.3371-73). As defendants readily admitted,[4] this minimum height requirement (raised for women from 5′3″ to 5′7″ effective July 1, 1973 and reduced to 5′6″ in July, 1974) had a severe and foreseeable adverse impact upon women[5] and was substantially responsible for the female application rate of only 9.58% for the period 1973 to 1976 (R.3378). The challenged pre-employment "physical agility test" also had a severe and foreseeable exclusionary impact on female applicants, who otherwise passed *every* other stage of defendants/petitioners' selection process (*i.e.*, written test, oral interview, medical exam, background check and personality inventory) at rates substantially equivalent to those of male applicants (R.3381-82).

The only previous physical agility test administered to candidates for sworn positions since 1968 was given solely to "policewoman" applicants in 1969 (none

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[4]Deposition of Muriel Morse, General Manager, City Department of Personnel (dated June 10, 1976) at page 20.

[5]The 5′6″ height standard excludes 87% of all women, and only 20% of all men from applying for the "police officer" job. See the percentile grouping found in *National Center for Health Statistics, Public Health Service, U.S. Dept. of Health, Education and Welfare, VITAL HEALTH STATISTICS, WEIGHT, HEIGHT AND SELECTED BODY DIMENSIONS OF ADULTS, UNITED STATES, 1960-1962,* at 27, Table 2 (Series 11, No. 8) as cited in Note, *Height Standards in Police Employment and the Question of Sex Discrimination: The Availability of Two Defenses for a Neutral Employment Policy Found Discriminatory Under Title VII,* 47 S.Cal.L.Rev. 585, 588 n.13 (1974).

of whom were hired), while defendants hired 4,891 "policeman" applicants between 1968 and 1973 without *any* physical agility requirement (R.3379). The new "unisex" physical agility test excluded 50% of all women but only 2.6% of all men taking the test between 1973 and 1976 (R.3383).

Under the "unisex" program, LAPD also unified its lines of promotion for male and female officers, except that incumbent policewomen had to become "field certified" (*i.e.*, meet the new height and physical agility requirements and certain retraining standards at the Police Academy) in order to promote above the rank of sergeant. By 1976, there were only two female lieutenants, the only women to hold any of the 374 positions above the rank of sergeant (R.3375).

D. Validation Efforts.

In moving for summary judgment in August, 1976, defendants/petitioners submitted by affidavit three newly constructed "validation studies"[6] prepared in anticipation of the November 2, 1976 trial date, certain of which were purportedly based upon a "job analysis"

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[6]The principal studies relied upon were entitled:

(a) "Investigation of Height as a Predictor of Job Performance, Los Angeles Police Department," attached as Exhibit "B" to the Affidavit of William W. Ruch, filed August 6, 1976 (R.1994);

(b) "Major Findings, Los Angeles Police Department Work Sample Study," attached as Exhibit "B" to the Affidavit of Cheryl Mahaffey, filed August 6, 1976; (R..... Transmitted as Non-Reproduceable Document No. 2); and

(c) "Validation of Police Officer Physical Ability Test," attached as Exhibit "A" to the Affidavit of David Friedland, filed August 6, 1976 (R.2193).

A fourth study, "Officer/Suspect Height Differences as a Predictor of Performance on the Bar Arm Control Hold," dated August 26, 1976, was never made a part of the record below.

of the duties and activities of the entry-level police officer.[7]

However, plaintiffs/respondents discovered and developed substantial evidence of defendants/petitioners' prior, repeated and unsuccessful efforts to validate the minimum height requirement.[8] Moreover, with reference to the defendants/petitioners' eve-of-trial validation efforts,[9] each contained major methodological deficiencies which invalidate their findings. The job

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[7]This job analysis was submitted as Exhibit "A" to the Affidavit of Cheryl Mahaffey, filed August 6, 1976 (R..... Transmitted as Non-Reproduceable Document No. 2).

[8]This evidence included:

(a) The study of the "Height-Related Tasks" of police officers (June, 1973) by Dr. Gerald W. Gardner (who developed LAPD's new "unisex" physical agility test), concluding that there was "*no justifiable reason to prevent shorter persons from becoming police officers*" (Deposition of Gerald W. Gardner, dated September 20, 1973, at page 20);

(b) The City Personnel Department's participation in 1973-74 in a statewide validation study of height requirements, conducted by the Selection Consulting Center on behalf of a consortium of over ninety California police agencies and *concluding that minimum height requirements should be eliminated as not job-related* (Deposition of Muriel Morse, dated June 10, 1976, at page 44, and Deposition of Donnell R. Read, dated May 20, 1976, at pages 74-77);

(c) The "Drawn Weapon Frequency Survey" (1974), finding *no correlation between officer height and frequency of drawing a weapon* (Deposition of William Booth, dated August 27, 1976, at page 1 and Exhibit 14); and

(d) The City Personnel Department's study entitled "Relationship Between Height of Police Officers and Complaints, Injuries and Measures of Work Production" (1974), *finding no correlations between height and nine criteria of job performance* (Deposition of Donnell Read, dated May 20, 1976, at pages 52-55 and Exhibit 16) and resulting in the City Personnel Department's recommendation that the Civil Service Commission eliminate the 5'7" minimum height requirement (Deposition of Muriel Morse, dated June 10, 1976, at page 44).

[9]*Supra*, note 6.

relatedness of the selection tests and practices in issue was "not demonstrated in accordance with professionally accepted standards," since the new studies were riddled with deficiencies.[10] These deficiencies include:

(1) *Sample Composition.*[11]

No data for persons shorter than 5'8" or for persons who failed or did not take the physical agility test was analyzed, considered or reported.

(2) *Differential Validity*[12] *and Fairness.*[13]

None of the studies attempted to "differentially validate" either the minimum height requirement or the physical agility test *for women,* or to determine whether, assuming either standard is shown to be job-related for women as well as for men, it is "fair" to apply the standard in the same manner for both men and women.

(3) *Job Tenure and Assignment.*[14]

None of the studies attempted to examine the data and control for the effects of "job tenure"

[10]Affidavit of Dr. James J. Kirkpatrick (R.3583). Each of these deficiencies was specifically discussed by the Court of Appeals (Petition, Appendix "A", pp.23-26).

[11]R.2887-92. *See,* EEOC Guidelines at § 1607.5(b)(1); *Officers for Justice v. Civil Service Commission of San Francisco,* 395 F. Supp. 378, 380 (N.D. Cal. 1975); *Boston Chapter, NAACP, Inc. v. Beecher,* 504 F.2d 1017 (1st Cir. 1974).

[12]R.2883-93. *See,* EEOC Guidelines at § 1607.5(b)(5); *Albemarle Paper Company v. Moody,* 422 U.S. 405, 435-436 (1975); *United States v. City of Chicago,* 573 F.2d 416 (7th Cir. 1978); *LULAC v. City of Santa Ana,* 410 F. Supp. 873, 905-906 (C.D. Cal. 1976).

[13]R.2883-93. *See,* EEOC Guidelines at § 1607.5(b)(5).

[14]R.2888-91. *See,* EEOC Guidelines at § 1607.5(b)(4); *Officers for Justice v. Civil Service Commission of San Francisco, supra,* 395 F. Supp. at 380-381; *Boston Chapter, NAACP v. Beecher, supra,* 504 F.2d at 1025; *LULAC v. City of Santa Ana, supra,* 410 F. Supp. at 904.

or "job assignment," either of which could skew the results.

(4) *Rater Bias.*[15]

Certain of the studies[16] failed to control and correct for "rater bias" against women and against shorter persons, resulting from the use of male LAPD officers as raters, the presence of defendants/petitioners' counsel and the discussion during orientation of the participants of the purpose of the study in the context of the instant lawsuit.

(5) *Multiple Criteria.*[17]

In the various studies, attempts were made to correlate the minimum height requirement with no less than 24 different and discrete criteria of job performance, yet no controls were imposed to insure that the validity findings reported were significant and not merely the result of chance correlations to one of multiple criteria.

E. Availability of Less Discriminatory Alternatives.

Major metropolitan police and sheriff's departments throughout the United States utilize alternative employee selection standards and procedures which have significantly less adverse impact upon female applicants than the minimum height and agility requirements utilized since 1973 by defendants/petitioners, yet result in no impairment in safe and efficient job perform-

[15]R.2891. *See, Albemarle Paper Company v. Moody,* 422 U.S. 405 (1975) at n.32.

[16]*E.g.,* "Major Findings, Los Angeles Police Department Work Sample Study," *supra,* n.6.

[17]Section 14(B)(7) of the "Uniform Guidelines on Employee Selection Procedures," 43 Federal Register 38290 (August 25, 1978).

ance.[18] In the past seven years, minimum height requirements have been voluntarily reduced or eliminated as non-job-related, and without reported impairment of performance, by literally hundreds of law enforcement agencies, large and small, urban and rural.[19]

[18]In September and October, 1976, nineteen depositions were taken of high-ranking police administrators, patrol division commanders, personnel and training directors and female field patrol officers and supervisors at departments throughout the United States. By way of relevant example, the New York City Police Department eliminated its 5'7" standard for men and 5'2" standard for women in 1973, resulting by 1976 in at least 50% of female police officers being below 5'6" (Depositions of Lt. Lucy A. Acerra, dated September 15, 1976, at p.21, and of Sgt. Allan C. Dinnegar, dated October 11, 1976, at p.100). After commanding more than 80 women on patrol assignments in the Bronx, Deputy Chief Anthony V. Bouza concluded that it was not necessary to the "safe and efficient duties of a police officer that he or she be 5'6" in height" and that male and female officers performed "equally and interchangeably." (Deposition of Anthony V. Bouza, dated September 16, 1976, at pp. 41-43 and 90). The Metropolitan Police Department in Washington, D.C., lowered its 5'7" minimum height requirement to 5'0" in June, 1973, resulting by 1976 in at least 60% of the more than 300 women being below 5'7" (Deposition of Claudia Anne Hayes, dated September 21, 1976, at pp. 8 and 25). Former Chief of Police Jerry Wilson concluded that "people under 5'6" can perform all aspects of police work" and that men and women on patrol performed "comparably." (Deposition of Jerry Wilson, dated September 20, 1976, pp. 32-37 and 73).

[19]By the end of 1974, some 152 law enforcement agencies in states other than California were operating and hiring with no minimum height requirement whatsoever or a minimum of 5'0" or less, including the police departments of New York, Washington, D.C., Boston, Dallas, Detroit, Miami, Atlanta, Tucson, Omaha, El Paso, Fort Worth, Kansas City, Memphis, Pittsburgh, Reno and St. Paul and the State Police in Illinois, Ohio and Minnesota. See, Washington, Brenda, *Deployment of Female Police Officers in the United States* (1974), a survey report published by the International Association of Chiefs of Police. Similarly, in the state of California alone, by the end of 1974, fully 95 different law enforcement agencies were operating and hiring with no minimum height requirement, including the Police Departments of San Francisco, San Diego, San Jose, Santa Barbara, Stockton, Palo Alto, San Mateo,

Similarly, hundreds of major law enforcement agencies successfully select, train and deploy sworn personnel without using any *pre-employment* physical agility test,[20] insisting instead upon sound health and administering physical tests following a period of special conditioning and training.

F. Purposeful Discrimination.

It was the avowed and publicly announced policy of the LAPD to eliminate women *per se* from employment in sworn positions. In January, 1971 (and on several subsequent occasions), then Police Chief Edward M. Davis announced that it was his intention to reduce the number of sworn policewomen to a force of twelve (one female matron at each City jail), that women did not belong in police work and that as women retired, their positions would be filled by men.[21] Following the four year hiring freeze on women (1969-73), during which time 3,211 men were hired, LAPD transferred incumbent policewomen to inside secretarial jobs (R.19), raised the height requirement

Barstow, Whittier, Pasadena, Gardena and Covina and the Sheriff's Departments for San Francisco, San Diego, Santa Barbara, Santa Clara, and Fresno Counties. See, *Employment Opportunities in California Law Enforcement*, 1974-75, issued by Commission on Peace Officer Standards and Training, Department of Justice, State of California (R.3826-27).

[20]As of 1975, some 100 such agencies which responded to a questionnaire survey by the International Association of Chiefs of Police reported that no physical agility test was administered in the employee selection process, including the Metropolitan Police Department in Washington, D.C., and the police or sheriff's departments in Boston, Pittsburgh, St. Louis, Indianapolis, Denver, Seattle, St. Paul, Tampa, Kansas City, Knoxville, Ann Arbor, Dayton, Wichita, Albuquerque, San Diego and Sacramento. See, Washington, Brenda, *Deployment of Female Police Officers in the United States* (1974) (R.3828).

[21]Affidavit of Fanchon Blake, filed October 4, 1976 (R. 3362).

for women from 5'4" to 5'7" and erected a new physical agility requirement under the "unisex" program unveiled in July, 1973 (R.3371-73). The LAPD thereupon attempted to continue hiring from all-male eligibility lists in the fall of 1973, until plaintiffs/respondents filed suit and applied for a preliminary injunction against same (R.14-35) and despite Requests for Notification of job opportunities then on file from some 4,500 women (R.20). Beginning in the fall of 1973, defendants/petitioners initiated a practice of "skimming" from the top of short-term eligibility lists (rather than exhausting longer-term lists), thereby giving veterans (and hence males) a far greater percentage of new appointments (R.3447 and 3555). And each year since 1973, the number and percentage of women in sworn positions has continued to decline (R.3375-78).

REASONS WHY THE WRIT SHOULD BE DENIED.

I.
THIS CASE IS NOT RIPE FOR REVIEW BY THE SUPREME COURT.

A. Preliminary Posture of Case.

Defendants/petitioners concede, as they must, in their petition for a writ of certiorari that the "Circuit Court *remanded* [for trial] the portions [of the case] relating to the lawfulness of the City's Police Officer personnel tests [*i.e., all* post-1973 practices], and set forth the . . . legal standards which the District Court *is to apply*." (Emphasis added) (Petition, p.14). Indeed, footnote thirteen in the opinion of the Court of Appeals specifically states in relevant part: "We express no opinion on the question whether appellees *will be able* to make a successful showing of business necessity *at trial*." (Emphasis added) (Petition, Appendix "A", p.26, n.13). Further, the concluding paragraph of the opinion states "[t]he judgment is reversed and the cause is *remanded* to the District Court *for further proceedings* consistent with the views herein expressed." (Emphasis added) (Petition, Appendix "A", p. 37).

Thus, this Court is presented with a request for interlocutory review of a non-final judgment in an action which, but for the instant petition, would be about to go to trial. It is settled law that under such circumstances, the case is not presently ripe for review. In *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967), in a *per curiam* opinion, this Court held as follows at 389 U.S. 328:

"*The Court of Appeals ruled on various legal issues presented to it but remanded* to the District Court to consider whether there had in fact been a contempt and, also, if there was a contempt, whether it was 'of such magnitude as to warrant retention, in part or to any extent, of the coercive fine originally provided for in contemplation of an outright refusal to obey.'

"Petitioners seek certiorari to review the adverse rulings made by the Court of Appeals. However, *because the Court of Appeals remanded the case, it is not yet ripe for review by this Court.* The petition for a writ of certiorari is denied." (Emphasis added).

See also, *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 584-585 (1952); *Cobbledick v. United States,* 309 U.S. 323, 324-325 (1940); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916); and *American Construction Co. v. Jacksonville, T. & K. W. Ry. Co.,* 148 U.S. 372, 384 (1892). The above holding in *Brotherhood* is particularly applicable to the instant case. Indeed on July 16, 1979, or no less than four days subsequent to the filing of the petition herein, counsel for petitioners argued, *on the record* in proceedings in this case before the District Court, to the effect that this case is not even yet ripe for the issuance of a preliminary injunction. The background circumstances to this statement were that on June 28, 1979, plaintiffs/respondents herein filed a motion for a preliminary injunction in the District Court in response to defendants/petitioners' announcement some nine days following the filing of the Court of Appeals opinion that 700 new police officers were about to be selected and hired pursuant

to the same exclusionary requirements in use by the LAPD since 1973. Defendants/petitioners requested a lengthy continuance of the hearing on the motion for a preliminary injunction. At the hearing on the request for a continuance, the following colloquy occurred at pages 4 and 9:

"THE [DISTRICT] COURT: Of course, the case is not finished. *And even if the mandate came down here, it would be remanded to this Court for trial. There has been no trial.*

MR. HUNT [COUNSEL FOR PLAINTIFFS/RESPONDENTS]: There has been a determination by the Ninth Circuit, your Honor, as to several issues that the Plaintiffs are entitled to judgment.

THE COURT: As I read the decision, I don't believe they granted summary judgment for the Plaintiffs in this case.

I granted summary judgment for the Defendants, which they said was not right, because the burden of proof was on the Defendant to prove the job relatedness of the selective process and *there's been no trial on that.*

* * *

MR. BAKER [COUNSEL FOR DEFENDANTS/PETITIONERS]: I think as your Honor correctly characterized it, *we have a long way to go yet*—not the least of which is a consideration of what the appropriate remedies, if any, are going to be in this case once it is returned to this Court." (Emphasis added).

Plaintiffs/respondents submit that since as recent as July 16, 1979, it was defendants/petitioners' position that this case has a "long way to go," to the extent

that it is too early even for the issuance of a preliminary injunction, and since defendant's counsel questioned what relief, "if any," is to be afforded, it follows that this case hardly is ripe for review by the United States Supreme Court. At such time as review of a subsequent final decree herein may be sought and secured, this Court will have the power to reach back and correct any errors in prior interlocutory proceedings below.

B. Impossibility of Meaningful Review.

The problems which this Court would encounter if it were to undertake review of this case in its present procedural posture can be illustrated by concrete examples. The very first question presented (Petition, p.3) and the very first argument made (Petition, p.16) concern an interpretation of three paragraphs of the thirty-seven page Court of Appeals decision. Defendants/petitioners vigorously contend that the writ should be granted because, by these three paragraphs, the Ninth Circuit has held that ". . . Title VII requires the 'modification of [law enforcement] policies' if such modification will enable the department to hire individuals with less physical ability. App. "A", pp. 30-31" (Petition, p.16).

Initially, plaintiffs/respondents note that they disagree with the extreme interpretation put forth by defendants/petitioners as concerns the three paragraphs in question. Notably, the bracketed material (*i.e.*, "[law enforcement]") was inserted by defendants/petitioners and not written by the Court of Appeals. Plaintiffs/respondents submit that these three paragraphs of the Ninth Circuit's opinion mean only that if, on remand, plaintiffs can show that there are alternative non-discriminatory selection standards (not "[law enforcement] policies") which are as job-related as the discriminatory standards being utilized by defendants, then defendants/respondents are required to utilize the non-discriminatory selection standards. This "less discriminatory alternative" principle was among the holdings of this Court in *Albemarle Paper Company v. Moody,* 422 U.S. 405, 425 (1975). Indeed in the Ninth Circuit opinion, the heading above the same three paragraphs is "Availability of Less Discriminatory Alternatives." Further, the first and last sentences of the same three paragraphs read as follows:

> "Even *if* an employer meets his burden of demonstrating business necessity, Title VII plaintiffs *may* prevail *if* they show that alternative selection devices are available that would serve the employer's legitimate interests without discriminatory effects. (*Albemarle, supra,* 422 U.S. at 425.)
>
> * * *
>
> "*So long as non-discriminatory alternatives serve the legitimate interests of the police in safe and efficient job performance,* police departments cannot pursue policies that require the use of selection standards that are themselves prima facie violations of Title VII." (Emphasis added). (Petition, Appendix "A", pp. 30-31).

Under these circumstances plaintiffs/respondents point out the obvious: meaningful review of the Court of Appeals decision concerning the "availability of less discriminatory alternatives" is both inappropriate and impossible at the present juncture. First, neither the decision below when fairly read nor the state of the record raises the first Question Presented in the petition. Second, the question is at best prematurely raised in

the context of potential if not imagined impairment of defendants/petitioners' asserted constitutional right to unfettered discretion in matters of law enforcement policy, since there has been no trial, findings, judgment or relief on the less discriminatory alternative issue. Finally, if this Court were to grant certiorari on this issue at this time, the Court would be presented with the anomalous situation of defendants/petitioners placing one interpretation on a few lines from the opinion below, coupled with an argument that under their interpretation the decision is incorrect, while at the same time the plaintiffs/respondents would be arguing that a different interpretation is more appropriate and that under their interpretation, the decision below is correct, all completely in the abstract in terms of liability or remedy.

Because there are no concrete judically determined facts underlying this statement of the less discriminatory alternative principle, this Court would be required to render an advisory opinion, interpreting the Ninth Circuit's phrasing of same and ruling on its validity completely in a vacuum, without knowing what the actual consequences have been or indeed would be, either in the case before it or in any other case. Among the oldest and most well-established applications of the ripeness principle, itself an adjunct of the "case or controversy" requirement of Article III, Section 2 of the United States Constitution, is the strong proscription against such "advisory opinions." *See, Alabama v. Arizona*, 291 U.S. 286, 291 (1934).

Another example of the impossibility of meaningful review of this case in its present posture concerns defendants' second argument that ". . . the Circuit Court in *Blake* adopted a standard of proof for em-

ployers which *will be* impossible to meet." (Emphasis added). (Petition, p.18). First, as is discussed in Part III, *infra*, the Court of Appeals' standards and validation principles follow the holdings of this Court in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971) and *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975) and comport well with the application of these principles by other Courts of Appeal. Second, and more importantly as a reason for denying the writ, there is not yet any factual record on the basis of which to review these standards; this entire portion of the case was remanded for trial. Once again, the problem with this argument is that it is premature, and no aspect of post-1973 personnel practices of the LAPD is ripe for review. All of the evidence continues to be a raw, undifferentiated mass of affidavits, depositions, stipulations and documents. Should this Court take this issue at this time for review, defendants/petitioners would be arguing that as a fact certain standards cannot be met, while plaintiffs/respondents would argue that the standards can but have not been met, all completely in the abstract and in advance of any trial below where the standards could be applied to any new evidence of job relatedness as well as to the validation studies and other evidence submitted by affidavit in 1976.

II.

THIS COURT SHOULD NOT REVIEW A VOLUMINOUS RECORD TO RESOLVE FACTUAL DISPUTES IN A CASE REMANDED FOR TRIAL.

Plaintiffs/respondents submit that the basic underpinnings of defendants/petitioners' principal arguments are rooted in an analysis and version of the facts

which is completely at odds with both the facts in the record and the facts as described in the Court of Appeals' opinion.

Firstly, plaintiffs/respondents point out that the "Statement of the Case" prepared and submitted by petitioners (Petition, pp.5-15) as well as the other descriptions of the record found throughout the petition, constitute defendants/petitioners' strained and at times myopic version of the facts in this case and not plaintiffs/respondents' version. More importantly, in the Court of Appeals' opinion, a radically different version of the record is found, explaining perhaps petitioners' repeated references throughout their "Statement of the Case" and entire Petition to the statements and rulings of the District Court. Although plaintiffs/respondents submit that any fair reading of the record shows that defendants/petitioners' version of the record is grossly misleading and at times wholly inaccurate, the more important point is that interlocutory review on certiorari is almost never appropriate "to review evidence and discuss [or determine] specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

A few examples will suffice to make the point. Perhaps the most striking instance of a total misstatement of undeniable facts concerns the second full paragraph of page 10 of the Petition where, after describing the validation studies relied upon by defendants/petitioners to justify their discriminatory selection devices, the Petition reads:

> "In response to the City's evidence of statistical corroboration of the job-relatedness of height and the physical abilities test, the Plaintiffs submitted the affidavit of their expert, James J. Kirkpatrick, to attest to certain purported methodological de-

> ficiencies. Dr. Kirkpatrick did not take the position that the City's requirements were not job-related (see B.R.3603-04), *nor did he state that the City's validation studies were not professionally acceptable.*" (Footnote omitted). (Emphasis added).

Despite the absoluteness of the above-quoted statement, the affidavit of Dr. Kirkpatrick referred to and found in the record on appeal at pages 3583-87 reads as follows in relevant part:

> "3. Although my preparation for trial has not yet been completed, on the basis of my review of defendants' validation efforts (identified above) and my knowledge of appropriate legal and professional standards governing such validation studies, it is my professional opinion that: (1) each of defendants' studies contain major methodological deficiencies, several of which are common to more than one study; (2) these major deficiencies invalidate the findings of each of those validation studies; and (3) *the job-relatedness of the selection tests and practices at issue in this action has not been demonstrated in accordance with legally and professionally accepted standards.*" (Emphasis added).

Another example of what plaintiffs/respondents consider to be egregious misstatements of the record by defendants/petitioners is found at the paragraph of the petition which begins on page nine and carries over to page ten. Here defendants/petitioners unequivocally assert that their two formal validation studies "demonstrated" job-relatedness of defendants/petitioners' height requirement and physical abilities test. In sharp contrast, the Court of Appeals in discussing these same validation studies stated:

> "*The studies failed to show* that persons shorter than 5'6" (the level of the height requirement) would be more likely to use strong force than taller persons, because no data was reported for persons shorter than 5'6" . . . ." (Petition, Appendix "A", pp. 23-24).

Notably, unreported findings in one of these studies[22] revealed that persons 5'7" are even less likely to use strong force than were persons 5'8" to 5'9" and person 5'10" to 5'11". According to data collected by defendants/petitioners' outside experts, the persons in the sample who were 5'7" in height used "strong force" in only 4.3% of all arrests reported, which is only bettered by persons 6'0" or taller (R.2966 and 3140).

Yet another example of the grossly misleading nature of defendants/petitioners' description of the record is found at pages 10 and 11 of the Petition, where it is stated:

> "Additionally, the Plaintiffs submitted copies of certain City studies, and a number of depositions of individuals from other police agencies relating to performance of women officers who did not meet the City's physical standards.
>
> "The Plaintiffs' depositions demonstrated that other police departments have restructured their policies or their jobs to accommodate shorter and weaker Police Officers. For example. . . ."

In stark contrast to the above-quoted description of the record, the Court of Appeals in discussing this evidence stated:

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[22] "Investigation of Height as a Predictor of Job Performance," attached as Exhibit "B" to the Affidavit of William Ruch (R.1994).

> "Appellants did not confine their attack to methodological disputes; they also introduced evidence of contrary findings of other studies. They discovered that the City had been involved in four other studies that investigated the relationship of height to job performance by police. *Each of these studies had concluded that height was not significantly related to police job performance.* One of the studies, the "Drawn Weapon Frequency Survey," had found no correlation between police officer height and the frequency of drawing a weapon. This finding directly contradicted appellees' contention that shorter officers are more likely to use strong force, particularly force stronger than the bararm control hold. *They also produced numerous depositions from police officials in other major American cities that have reduced or eliminated minimum height requirements for police. This testimony indicated that persons under 5'6" in height can, and are, safely and efficiently performing all aspects of police work.*" (Emphasis added). (Petition, Appendix "A", pp.25-26).

Plaintiffs/respondents do not bring these evidentiary inaccuracies in the petition to the attention of this Court for idle reasons. The point is that defendants/petitioners' version of the facts set forth in their petition is the vital underpinning to the legal arguments made throughout the petition. When the Ninth Circuit opinion is read, however, and the facts as therein recited are taken into account, the arguments of defendants/petitioners must fail under the legal analysis set forth in the opinion of the Court of Appeals.

Under these circumstances, and aside from any dispute between the parties as to the true facts, defendants/

petitioners are in reality asking this Court to review the extensive record in this case and to determine the accuracy of the Ninth Circuit's version of the facts. Plaintiffs/respondents respectfully submit that reviewing an extensive record to determine which version of the facts is accurate is not an appropriate function of the United States Supreme Court. There can be no doubt but that were this Court to assume the burden of reviewing this case in its present posture, each Justice would be required to analyze the entire approximately 10,000 page record[23] in order to pass upon the Questions Presented by defendants/respondents in their petition seeking prior to trial the interlocutory review on certiorari of the opinion of the Ninth Circuit Court of Appeals.

III.

THE NINTH CIRCUIT'S DECISION ON TEST VALIDATION COMPORTS WITH THIS COURT'S PRIOR DECISIONS AND IS CONSISTENT WITH CASE LAW IN OTHER CIRCUITS.

Although plaintiffs/respondents argue above that the appropriateness of the Ninth Circuit's legal analysis of the requirements of "business necessity", "job-relatedness," and "validation" is not ripe for review, the writ should also be denied because there is no conflict between decisions of the sort contemplated by Rule 19 (1)(b) of the Rules of the Supreme Court. The careful legal analyses throughout the opinion of the Court of Appeals are, in each and every instance, based on the sound and settled precedents of this Court. For this reason, plaintiffs/respondents will not respond point by point to each of the contentions made in

[23]See n.2, *supra.*

the petition. Instead, a few specific responses should suffice.

Defendants/petitioners strenuously criticize (Petition, pp.19-20) the Ninth Circuit's reliance upon the Guidelines of the Equal Employment Opportunity Commission on Employee Selection Procedure, 28 C.F.R. § 1607 ("EEOC Guidelines"). Indeed, defendants/petitioners go so far as to assert that the Circuit Court's various statements on validation, job-relatedness, and business necessity, which without exception were based upon provisions of the EEOC Guidelines and were set forth to guide the District Court upon remand of these issues for trial, "will limit or eliminate personnel testing in the Ninth Circuit."

The short and simple answer to this argument is that it ignores the precise holding of this Court in *Albemarle Paper Company v. Moody*, 422 U.S. 405, 431 (1975), made over four years ago, and the holding of this Court in *Griggs v. Duke Power Company*, 401 U.S. 424, 433-34 (1971), made over eight years ago, that the EEOC Guidelines are "entitled to great deference". Since this has been the law of the land for almost a decade, followed by countless decisions of the various Courts of Appeal,[24] plaintiffs/respond-

[24]*United States v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978); *EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975); *Rogers v. International Paper Co.*, 510 F.2d 1340 (8th Cir. 1975); *Kirkland v. New York State Dept. of Correctional Services*, 520 F.2d 420 (2d Cir. 1975), cert. den. 429 U.S. 823 (1976); *Douglas v. Hampton*, 512 F.2d 976 (1975); *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974); *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973); *Harper v. Mayor and City Council of Baltimore*, 359 F. Supp. 1187 (D.Md. 1973), aff'd on other grounds, ... F.2d ..... (4th Cir. 1973).

ents suggest that defendants/petitioners' "doomsday" argument is without foundation.

In a similar vein, defendants/petitioners vigorously argue (Petition, pp.21-24) that the Ninth Circuit's rejection of a "rational relationship" standard for showing job relatedness and insistence upon the "professionally accepted methods" standard, was inapproporiate and in conflict with prior decisions of this Court and of certain other circuits. Again, the dispositive response is that in *Albemarle Paper Company v. Moody*, 422 U.S. 405, 431 (1975), this Court unequivocally stated:

> ". . . discriminatory tests are impermissible unless shown, *by professionally acceptable methods*, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated. 29 C.F.R. § 1607.4(c) [EEOC Guidelines]." (Emphasis added)

Defendants/petitioners also contend (Petition, p. 23) that it is not enough for the plaintiffs in a Title VII case to point out "methodological defects", but further that the burden should be on the plaintiffs to prove "actual harm to the usefulness of the study" resulting from the methodological defects. Again this argument is at odds with the approach taken by this Court in *Albemarle Paper Company v. Moody*, 422 U.S. 405, 423-433 (1975). Here, after the validation study was found to be inadequate due to methodological defects, this Court stated:

> "[t]here is, in short, *simply no way to determine* whether the criteria *actually* considered were sufficiently related to the Company's legitimate interest in job-specific ability to justify a testing system

> with a racially discriminatory impact." (First emphasis added; second in original). 422 U.S. at 433.

Plaintiffs/respondents submit that the immediately above-quoted language hardly comports with defendants/petitioners' position that a showing that a validation study not done according to "professionally acceptable methods" nevertheless can be used to legally justify a discriminatory selection device.

Similarly, there is simply no validity to defendants/petitioners' argument that, contrary to the instant decision by the Ninth Circuit, five circuits have approved a demonstration of job-relatedness by a "rational relationship" showing "other than formal validation studies." (Petition, p.22). A close reading of the cited cases shows that the holdings merely were that job-relatedness had been shown; in none of the cases is there either an express or implied rejection of the "professionally accepted methods" standard which, as noted above, was adopted by this Court in *Albemarle, supra* at 431. Moreover, defendants/petitioners fail to cite cases, which are legion in all circuits,[25] which do expressly apply the *Albemarle* principle.

Finally, defendants/petitioners argue (Petition, pp. 24-27) that the Circuit Court below was incorrect in its holding that when a selection device has "adverse impact," the burden shifts to prove job-relatedness even when the adverse impact showing "is not probative of *intentional* discrimination." This issue, of course, was long-ago settled by this Court in *Griggs v. Duke Power Company*, 401 U.S. 424, 432 (1971), where it was held:

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[25]See cases cited in note 24, *supra*.

". . . good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."

As this Court more recently stated in *Washington v. Davis*, 426 U.S. 229, 246-247 (1976):

"*Under Title VII*, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, *discriminatory purpose need not be proved*, and that it is an *insufficient response to demonstrate some rational basis for the challenged practices.*" (Emphasis added).

See also, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-806 (1973); *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); and *Teamsters (IBT) v. United States*, 431 U.S. 324 (1977).

In *Dothard v. Rawlinson*, 433 U.S. 321 (1977), this Court applied the "disparate impact" standard to minimum 5′2″ height and 120 pound weight requirements for prison employees, utilized by the state of Alabama Board of Corrections. This Court held that the statistically established exclusion of female applicants was a *prima facie* violation of Title VII, *without* proof of purposeful discrimination. Importantly, this Court in *Dothard* further specifically rejected the state employer's claim that minimum hiring standards of public employers set by statute should be afforded "greater deference than is typically given private employer-established job qualification," concluding that:

"The relevant legislative history of the 1972 amendments extending Title VII to the States as

employers does not, however, support such a result. Instead, *Congress expressly indicated the intent that the same Title VII principles be applied to government and private employers alike.* See H.R. Rep. No. 92-288, 2d Cong., 1st Sess. p.17 (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess. p.10 (1971). See also *Schaeffer v. San Diego Yellow Cabs*, 462 F.2d 1002 (CA9). *Thus for both private and public employers, "The touchstone is vate and public employers, 'The touchstone is business necessity,'" Griggs*, 401 U.S., at 431. (Em-

Conclusion.

For the reasons and upon the authorities discussed above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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